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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 CRYSTAL MCLARAN,
11 Plaintiff,
12 v.
13 RANDY RAKEVICH, *et al.*,
14 Defendants.

CASE NO. 3:20-cv-05395-JRC
ORDER GRANTING MOTION TO
DISMISS

15
16 This 42 U.S.C. § 1983 civil rights matter is before the Court on the parties' consent to
17 proceed before the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. §
18 636(c)(1).

19 According to the allegations of the operative complaint (Dkt. 5), plaintiff is a co-owner of
20 a tree service company. She brings claims against Randy Rakevich, a logging safety and health
21 inspector for the Washington State Department of Labor and Industries Division of Occupational
22 Safety and Health, as well as Rakevich's direct supervisor (Matt Ludwig) and another supervisor
23 (James Smith).

1 Plaintiff alleges that beginning April 27, 2017, defendant Rakevich investigated alleged
2 safety complaints at plaintiff's company. *See* Dkt. 5, at 6. Plaintiff claims that defendant
3 Rakevich used his position to sexually harass her, culminating in an incident in July 2017, when
4 Rakevich met with plaintiff at a restaurant, where he allegedly implicitly propositioned plaintiff
5 to engage in a sexual relationship with him or else he would impose fines on her business. *See*
6 Dkt. 5, at 9. Plaintiff alleges that because she refused, Rakevich imposed an unusually high
7 safety violation fine on her business. And plaintiff further claims that defendants Ludwig and
8 Smith—Rakevich's supervisors—were informed of this harassment and retaliation, yet refused
9 to take any action.

10 Defendants have moved for dismissal of plaintiff's claims. The motion to dismiss is
11 granted for the following reasons. First, defendant Ludwig is dismissed because plaintiff fails to
12 allege facts showing that he personally participated in the alleged constitutional deprivations.
13 Second, although plaintiff asserts that defendant Rakevich's alleged sexual harassment violated
14 equal protection, and as alleged these actions would currently violate clearly established law, the
15 law in the Ninth Circuit had not yet progressed to this point at the time these acts were allegedly
16 committed. Therefore, qualified immunity shields defendant Rakevich from liability for
17 damages on plaintiff's equal protection claims. Third, although plaintiff claims that Rakevich's
18 actions also violated due process, plaintiff fails to allege plausible claims of denial of substantive
19 and procedural due process because, among other things, she does not identify constitutionally
20 protected interests. Finally, the Court accepts plaintiff's concession and accordingly dismisses
21 her claims for negligence and intentional infliction of emotional distress, her claims against
22 officials in their official capacities for damages, and her claims against defendant Smith.

The only surviving claim is plaintiff's claim for injunctive relief against defendant Rakevich for violation of equal protection. However, the Court also grants plaintiff leave to amend to include a state-law discrimination claim and to re-allege her claims against defendant Ludwig and her claims for violation of procedural due process and intentional infliction of emotional distress, as set forth below.

BACKGROUND

7 Plaintiff brought this matter in April 2020. Dkt. 1. In the operative complaint (Dkt. 5),
8 she alleges that beginning in April 2017, defendant Rakevich, a logging safety and health
9 inspector for the State, conducted inspections and filed reports regarding alleged safety
10 violations at plaintiff's tree service company. *See* Dkt. 5, at 5–7.

11 Plaintiff asserts that on separate occasions beginning in April 2017, defendant Rakevich
12 conducted inspections of plaintiff's logging company. Dkt. 5, at 5. Plaintiff asserts that there
13 was no basis for the complaints that Rakevich was investigating and that Rakevich should have
14 contacted her husband, who was listed as the owner of the company, not her. *See* Dkt. 5, at 5–6,
15 9. Then, on July 6, 2017, plaintiff alleges that defendant Rakevich, who had been forced to leave
16 a prior position due to sexual misconduct, asked plaintiff to meet him at a fast food restaurant to
17 sign paperwork to close an inspection. Dkt. 5, at 7, 10. Plaintiff claims that when he called her
18 to ask her to meet with him, defendant Rakevich "sounded very nervous and was unable to
19 explain the exact process." Dkt. 5, at 7. Plaintiff claims that she called defendant Ludwig—
20 plaintiff's direct supervisor—to ask "if they were closing an inspection, would the[y] need to
21 meet to sign anything?" Dkt. 5, at 6. Defendant Ludwig allegedly "told [plaintiff] that he
22 couldn't think of anything they would need to sign, but expressed no further interest, and

1 initiated no action or investigation of any kind.” Dkt. 5, at 6.

2 Plaintiff claims that during the meeting at the restaurant, defendant Rakevich implied that
 3 he would attack her business unless she began a romantic/sexual relationship with him. Dkt. 5,
 4 at 9. As evidence of why she understood defendant Rakevich to be propositioning her to enter a
 5 sexual relationship with him, plaintiff cites defendant Rakevich’s insistence on moving to a
 6 secluded booth at the restaurant, his threatening to fine her, and his attempt to ingratiate himself
 7 with her by saying, “I’m so soft-hearted, I’d never give out citations.” Dkt. 5, at 8. Rakevich
 8 also allegedly told plaintiff, “[I]t’s too bad someone like you has to learn these things the hard
 9 way. But that’s up to you.” Dkt. 5, at 9.

10 Four days later, according to plaintiff, defendant Rakevich called plaintiff and threatened
 11 her with more violations. Dkt. 5, at 10. Plaintiff alleges that defendant Rakevich subsequently
 12 fined her an unusually high amount for a first-time safety violation. Dkt. 5, at 10. Plaintiff
 13 negotiated the fine down on appeal but does not allege that she pursued further options to
 14 invalidate the fine. Then, she brought this action. *See* Dkt. 5, at 10.

15 Defendants have filed a motion to dismiss. Dkt. 14. Plaintiff has filed her response (Dkt.
 16 20), defendants have filed a reply (Dkt. 21), and the matter is ripe for decision.

17 DISCUSSION

18 I. Legal Standard

19 Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss if the complaint
 20 fails to state a claim upon which relief can be granted. A motion to dismiss focuses on the
 21 allegations in the complaint. The Court examines whether plaintiff alleges sufficient facts that if
 22 taken as true, entitle her to relief. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1 A complaint must contain “a short and plain statement of the claim showing that the
 2 pleader is entitled to relief,” “in order to ‘give the defendant fair notice of what the . . . claim is
 3 and the grounds upon which it rests[.]’” Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550
 4 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). To survive a motion
 5 to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
 6 to relief that is plausible on its face.’” *See Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
 7 555).

8 When reviewing the motion to dismiss under Rule 12(b)(6), a court must accept as true
 9 all factual allegations—but not legal conclusions. *See Iqbal*, 556 U.S. at 678. “When there are
 10 well-pleaded factual allegations, a court should assume their veracity and then determine
 11 whether they plausibly give rise to an entitlement to relief.” *Id.*

12 The Court has also considered whether to allow plaintiff leave to amend her complaint.
 13 The decision whether to grant leave to amend rests within the discretion of the district court.
 14 *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047, 1058 (9th Cir. 2011). “The court should
 15 freely give leave when justice so requires” (Fed. R. Civ. P. 15(a)), and the Ninth Circuit
 16 interprets this standard liberally. *Cafasso*, 637 F.3d at 1058.

17 **II. Conceded Claims**

18 As a preliminary matter, the Court notes that plaintiff concedes to the dismissal of certain
 19 of her claims. First, plaintiff “agree[s] to dismiss this action as to [d]efendant Smith.” Dkt. 20,
 20 at 17. Second, plaintiff “voluntarily dismisses her negligence cause of action as [d]efendants
 21 Rakevich and Lud[wig]’s actions and statements were intentional and calculated to cause harm.”
 22 Dkt. 20, at 17. And third, plaintiff acknowledges that she cannot bring suit against officials in
 23 their official capacities for damages under § 1983. Dkt. 20, at 13. Therefore, the Court

1 dismisses plaintiff's claims against defendants Smith, her negligence claims, and her claims to
 2 the extent that she seeks damages from individuals in their official—rather than personal—
 3 capacities. The remainder of this Order addresses plaintiff's remaining claims against
 4 defendants Ludwig and Rakevich.

5 **III. Section 1983 Claims**

6 **A. Legal Standard**

7 "Section 1983 'is not itself a source of substantive rights, but a method for vindicating
 8 federal rights elsewhere conferred.'" *Sampson v. Cty. of L.A.*, 974 F.3d 1012, 1018 (9th Cir.
 9 2020) (quoting *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)). "In order to state a claim
 10 under § 1983, a plaintiff must plausibly allege that 'she suffered the deprivation of a federally
 11 protected right and that the alleged deprivation was committed by a person acting under color of
 12 state law.'" *Id.* (quoting *Hyun Ju Park v. City & Cnty. of Honolulu*, 952 F.3d 1136, 1140 (9th
 13 Cir. 2020)).

14 In addition, qualified immunity may shield an official from liability for damages. Two
 15 issues arise when addressing qualified immunity: "(1) whether there has been a violation of a
 16 constitutional right; and (2) whether that right was clearly established at the time of the officer's
 17 alleged misconduct." *C.V. ex rel. Villegas v. City of Anaheim*, 823 F.3d 1252, 1255 (9th Cir.
 18 2016) (citation omitted). Because qualified immunity is "an immunity from suit rather than a
 19 mere defense to liability" (*Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (citation omitted)), the
 20 Supreme Court has directed courts to resolve such questions "at the earliest stage of litigation
 21 possible." *A.D. v. California Highway Patrol*, 712 F.3d 446, 456 (9th Cir. 2013) (citations
 22 omitted). Thus, defendants can raise qualified immunity in a motion to dismiss, and district
 23 courts should grant a motion to dismiss on qualified immunity grounds if the record supports
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1 such a ruling. *See id.*

2 **B. Personal Participation: defendant Ludwig**

3 Plaintiff alleges that defendant Ludwig, allegedly defendant Rakevich's direct supervisor,
 4 is liable because he "was apprised by Plaintiff of [Rakevich's] harassment of and retaliation
 5 against [plaintiff] and refused to take action . . . instead supporting [Rakevich.]" Dkt. 5, at 3.
 6 Defendants correctly move for dismissal of the claims against defendant Ludwig because
 7 plaintiff has failed to allege facts adequate to show that defendant Ludwig personally
 8 participated in the alleged constitutional violations. *See* Dkt. 14, at 10.

9 "Liability under [§] 1983 arises only upon a showing of personal participation by the
 10 defendant. A supervisor is only liable for the constitutional violations of . . . subordinates if the
 11 supervisor participated in or directed the violations, or knew of the violations and failed to act to
 12 prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor cannot be held
 13 liable under § 1983 merely on the basis of supervisory liability. *See Alaska v. EEOC*, 564 F.3d
 14 1062, 1069 (9th Cir. 2009) (noting that although supervisory liability is inadequate, a claim of
 15 sexual harassment in violation of the Equal Protection Clause can be brought against an
 16 employer who "intentionally refus[ed] to redress the sexual harassment").

17 Here, plaintiff's only factual allegation regarding defendant Ludwig is that she called
 18 Ludwig *before* the meeting with Rakevich at the restaurant and "asked, if they were closing an
 19 inspection, would the[y] need to sign anything?" Dkt. 5, at 7. Ludwig allegedly told plaintiff
 20 "that he couldn't think of anything they would need to sign, but expressed no further interest, and
 21 initiated no action or investigation of any kind." Dkt. 5, at 7. Plaintiff does not allege that she
 22 contacted Ludwig after Rakevich allegedly propositioned her at the restaurant or that she
 23 otherwise made defendant Ludwig aware of her concerns. Thus plaintiff's allegations are

1 inadequate to support her claims that defendant Ludwig personally participated in Rakevich's
 2 alleged deprivations of plaintiff's constitutional rights. The Court dismisses the claims against
 3 defendant Ludwig; however, leave to amend may not be futile, so that the dismissal is with leave
 4 to amend.

5 The Court does not further address claims against Ludwig under § 1983 in this Order.
 6 The remainder of the § 1983 analysis focuses on claims against defendant Rakevich.

7 **C. Equal Protection Claim against Rakevich**

8 Plaintiff alleges that defendant Rakevich violated her right to equal protection because
 9 she was "singled out for discriminatory conduct based on her gender including sexual
 10 harassment, disparate treatment, and retaliation for refusing to engage in sexual conduct with
 11 Defendant Rakevich[.]" Dkt. 5, at 3. Defendants argue that plaintiff has failed to state a claim
 12 for violation of her right to equal protection because she has not identified any statute or
 13 classification singling her out for different treatment than others similarly situated. Dkt. 14, at 9.
 14 They alternatively argue that qualified immunity shields defendant Rakevich from liability for
 15 damages. Dkt. 14, at 11. The Court agrees with the latter argument.

16 "The Equal Protection Clause of the Fourteenth Amendment commands that no State
 17 shall deny to any person within its jurisdiction the equal protection of the laws, which is
 18 essentially a direction that all persons similarly situated should be treated alike." *Sampson*, 974
 19 F.3d at 1023 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

20 "Although the Supreme Court has never explicitly considered whether sexual harassment
 21 violates the Equal Protection Clause, it has long recognized that sex-based discrimination by
 22 state actors that does not serve important governmental objectives and is not substantially related
 23 to the achievement of those objectives is unconstitutional." *Id.* "Drawing on these equal

1 protection principles,” the Ninth Circuit has held that allegations of “persistent and unwelcome
 2 physical and verbal abuse’ in the workplace ‘state a claim of sexual harassment, which can be
 3 impermissible sex discrimination in violation of the Equal Protection Clause.’” *Id.* at 1024
 4 (quoting *Bator v. Hawaii*, 39 F.3d 1021, 1027, 1028 (9th Cir. 1994)).

5 Regarding the first step, plaintiff asserts that defendant Rakevich’s actions “would lead a
 6 reasonable woman to feel sexually harassed,” pointing out that she alleged other facts supporting
 7 that defendant Rakevich was propositioning her. *See Dkt. 20*, at 4. This includes Rakevich’s
 8 alleged history of sexual misconduct, nervous demeanor, refusal to give “a straight answer,”
 9 repeated efforts to move to a more “private area” of the restaurant, and choice to meet with
 10 plaintiff, when her husband “was listed as the owner” of the business. *Dkt. 20*, at 4–8.

11 The Ninth Circuit has recently held that sexual harassment by public officials providing
 12 social services violates Equal Protection because by definition, sexual harassment is “motivated
 13 by gender.” *Sampson*, 974 F.3d at 1023 (decided September 9, 2020) (internal citation and
 14 quotation marks omitted). In *Sampson*, a woman attempting to obtain legal guardianship of her
 15 niece alleged sexual harassment by the social worker assigned to her case. *Id.* at 1015. The
 16 Ninth Circuit held that the social worker’s comments on plaintiff’s appearance and marital status,
 17 urging her to end her marriage, inappropriately touching her, and attempting to coerce her into
 18 riding in his vehicle constituted sexual harassment in violation of the Equal Protection Clause.
 19 *See id.* at 1023; *see also Bohen v. City of E. Chicago, Ind.*, 799 F.2d 1180, 1186–87 (7th Cir.
 20 1986) (“[A] single discriminatory act against one individual can amount to intentional
 21 discrimination for equal protection purposes. An equal protection plaintiff therefore need not
 22 prove a discriminatory policy against an entire class; discrimination against the plaintiff because

1 of her membership in the class is by itself enough.” (Citations omitted.)).

2 Thus, contrary to defendants’ arguments, plaintiff need not identify a statute or official
 3 classification to establish her Equal Protection claim. *See* Dkt. 14, at 9. Under *Sampson*, it
 4 would appear that defendant’s alleged conduct could be sufficient to constitute a violation of
 5 plaintiff’s right to Equal Protection. *See* 974 F.3d at 1024. However, defendant is entitled to
 6 qualified immunity from damages for such conduct unless plaintiff can show his actions violated
 7 clearly established law *at the time*. *Sampson* was not decided until 2020, and the alleged conduct
 8 occurred in 2017. The Court in *Sampson* explained that until 2020, case law had only addressed
 9 sexual harassment in public schools, directed toward public employees in the workplace, or in
 10 prisons. *See id.* Therefore, the Court “reluctantly agree[d] that” qualified immunity shielded
 11 defendants from liability. *Id.* at 1023.

12 It is difficult to find a case more directly on point. Although after September 2020,
 13 *Sampson* made clear “that State public officials violate our Constitution’s promise of equal
 14 protection when they sexually harass the people they serve,” such was not clearly established
 15 before September 2020. Therefore, this Court also “reluctantly agrees” that qualified immunity
 16 shields defendant Rakevich from damages on the Equal Protection claim, and this claim is
 17 dismissed without leave to amend.

18 Because qualified immunity is immunity only from suit *for damages*, and since
 19 defendants have not separately addressed whether claims against defendant Rakevich for
 20 injunctive relief should be dismissed (*see* Dkt. 5, at 17), plaintiff’s claims for injunctive relief for
 21 violation of Equal Protection against defendant Rakevich are not dismissed at this time.

22 **D. Due Process Claims against Rakevich**

23 Plaintiff alleges that defendants violated her due process rights. *See* Dkt. 5, at 12.
 24

1 Defendants argue that this claim should be dismissed because plaintiff fails to identify a
 2 protected interest for due process purposes. *See* Dkt. 14, at 7. The Court agrees and dismisses
 3 plaintiff's due process claims.

4 **1. Procedural Due Process**

5 The requirements of procedural due process do not apply to every government action that
 6 adversely affects an individual and apply only to deprivations of "life, liberty, or property" as
 7 defined by case law. *See Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972). Thus "[a]
 8 procedural due process claim has two distinct elements: (1) a deprivation of a constitutionally
 9 protected liberty or property interest, and (2) a denial of adequate procedural protections."

10 *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

11 Plaintiff's complaint alleges deprivation of liberty—not property—interests. She
 12 purports to identify several constitutionally protected liberty interests she claims she was
 13 deprived of, but she identifies them only in vague and conclusory terms: (1) the right to due
 14 process before being deprived of fundamental rights, (2) the right to equal protection, (3) the
 15 right to freedom from discriminatory regulatory practices, (4) the right to freedom from a hostile
 16 and discriminatory regulatory climate, and (5) the right to be free from misuse of government
 17 power. *See* Dkt. 5, at 12.

18 At no point in her response to the motion to dismiss does plaintiff more particularly
 19 identify the liberty interest at issue. As noted, a procedural due process claim is not viable unless
 20 a plaintiff identifies a protected liberty or property interest. *See Kerry v. Din*, 576 U.S. 86, 101
 21 (2015). At present, plaintiff's procedural due process arguments are simply too conclusory to
 22 state a plausible claim. *Accord Motaghedi v. Pompeo*, 436 F. Supp. 3d 1345, 1366 (E.D. Cal.
 23 2020) (holding that conclusory allegations of violations of "enumerated and unenumerated rights
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recognized in Fifth Amendment jurisprudence, including . . . freedom from discrimination with respect to their fundamental rights” failed to state a plausible procedural due process claim).

Reading between the lines, it appears that plaintiff may be attempting to claim a protected liberty interest in freedom from sexual harassment. Plaintiff has not cited, and the Court has not found, any authority for the general proposition that a plaintiff who is the victim of alleged sexual harassment by a public official has necessarily been deprived of procedural due process so long as a procedure is in place to address that injustice.

But even if plaintiff has such a protected liberty interest for procedural due process purposes, she must explain how the applicable process available to her fell below the procedural safeguards constitutionally required to protect that interest. *See, e.g., Brittain v. Hansen*, 451 F.3d 982, 1000 (9th Cir. 2006). The Court notes that plaintiff alleges that she apparently was able to avail herself of a process for appeal from the fine imposed by defendant Rakevich and used this process to “bargain” for reduction of her fine. *See* Dkt. 5, at 10. Plaintiff does not explain how this appeal process was inadequate in light of the protected interest on which she relies or how this process otherwise ran afoul of the principles set forth in *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976). *See Brittain*, 451 F.3d at 1001 (noting that *Mathews* provides the applicable test for determining how much process is due).

In short, plaintiff has failed to plausibly allege a procedural due process violation and her claims of violation of procedural due process are dismissed. However, because leave to amend may not be futile, the dismissal is with leave to amend.

2. Substantive Due Process

“Substantive due process ‘forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with the rights implicit in the

1 concept of ordered liberty.”” *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (quoting
 2 *Nunez v. City of L.A.*, 147 F.3d 867, 871 (9th Cir. 1998)). Rights protected by substantive due
 3 process are even more circumscribed than those protected by procedural due process. For a
 4 substantive due process claim, the Supreme Court has described protected, “fundamental” rights
 5 as “those personal activities and decisions that this Court has identified as so deeply rooted in our
 6 history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that
 7 they are protected by the Fourteenth Amendment.” *United States v. Juvenile Male*, 670 F.3d
 8 999, 1012 (9th Cir. 2012) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997)).
 9 “Those rights are few, and include the right to marry, to have children, to direct the education
 10 and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, to
 11 abortion, and to refuse unwanted lifesaving medical treatment.” *Id.* A plaintiff must provide “a
 12 careful description of the asserted fundamental liberty interest” (*Glucksberg*, 521 U.S. at 721) or
 13 “a narrow definition of the interest at stake.” *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir.
 14 2007) (citing *Glucksberg*, 521 U.S. at 722).

15 Plaintiff has not provided authority for the proposition that the Supreme Court or the
 16 Ninth Circuit has identified freedom from sexual harassment as a fundamental liberty interest
 17 protected by the Fourteenth Amendment. Unlike procedural due process—which provides a
 18 flexible amount of protection depending on the nature of the right at issue—interests “either do
 19 or do not give rise to a” substantive due process claim. *Brittain*, 451 F.3d at 1000. And, again,
 20 the law has not yet caught up with plaintiff’s understanding of a fundamental liberty interest.
 21 Currently, there is no protected interest in freedom from sexual harassment for substantive due
 22 process purposes. *Accord Robinson v. Leonard-Dent*, No. 3:12CV417-PPS, 2013 WL 5701067,
 23 at *8 (N.D. Ind. Oct. 18, 2013), *amended*, 2013 WL 12303991 (Nov. 21, 2013) (“Freedom from
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1 sexual harassment is not on that list” of fundamental liberty interests); *Skoglund v. City of Foley*,
 2 No. CV 05-500-KD-C, 2006 WL 8437834, at *4 (S.D. Ala. June 26, 2006) (“The court is unable
 3 to find, and the plaintiff has failed to cite, any precedent that a citizen’s freedom from
 4 intimidation or sexual harassment of the nature described is a fundamental right protected by the
 5 constitution.”). Nor has plaintiff pleaded a claim of conscience-shocking behavior amounting to
 6 a violation of substantive due process. Even if she attempted to amend her complaint to assert
 7 such a claim, her amendment would be futile. *Accord Robinson*, 2013 WL 5701067, at *7
 8 (claims of years of sexual harassment of a business owner by a state employee did not amount to
 9 conscience-shocking behavior).

10 Plaintiff’s substantive due process claims are therefore dismissed with prejudice and
 11 without leave to amend.

12 **IV. State Law Claims**

13 As noted, plaintiff concedes to dismissal of her negligence claim, so that her remaining
 14 state law claim is for intentional infliction of emotional distress/outrage. *See* Dkt. 5, at 16; *see*
 15 also *Reyes v. Yakima Health Dist.*, 191 Wn.2d 79, 91 (2018) (intentional infliction of emotional
 16 distress and outrage are the same).

17 In her response to the motion to dismiss, plaintiff does not address defendants’ arguments
 18 concerning her intentional infliction of emotional distress claims. *See* Dkt. 20, at 16. Instead,
 19 plaintiff argues that she meant to include a claim under the Washington Law Against
 20 Discrimination (“WLAD”), ch. 49.60 RCW. *See* Dkt. 20, at 16. Because plaintiff fails to
 21 oppose defendants’ arguments regarding her intentional infliction of emotional distress claim, the
 22 Court deems the arguments to have merit and dismisses this claim with leave to amend. *See*

1 Local Civil Rule 7(b)(2).

2 Plaintiff requests that the Court grant her leave to amend to include a WLAD claim. Dkt.
 3 20, at 16. Defendants oppose this request on the basis that the claim is time-barred and unlikely
 4 to succeed. *See* Dkt. 21, at 7. As noted, leave to amend is generally liberally granted, although a
 5 court has discretion to deny leave to amend where there is undue prejudice to the opposing party,
 6 bad faith by the movant, futility, and undue delay. *Cafasso*, 637 F.3d at 1058.

7 Of these factors, prejudice is the most important. *Jackson v. Bank of Hawaii*, 902 F.2d
 8 1385, 1387 (9th Cir. 1990). And amendment is futile where “it appears beyond doubt” that the
 9 amended claim will be dismissed and the parties seeking amendment could “prove no set of facts
 10 in support of [their] claim[s] which would entitle [them] to relief.” *Id.* (alterations in original).

11 Here, defendants do not assert prejudice to them—the most important factor—and no
 12 undue prejudice is apparent from the record. Although they assert futility of amendment,
 13 defendants simply argue that WLAD does not apply outside the employment context. *See* Dkt.
 14 21, at 7. This is not true, as WLAD by its own terms applies to discrimination (including sexual
 15 harassment) in any place of public accommodation. RCW 49.60.215, *cited in Floeting v. Grp.*
 16 *Health Coop.*, 192 Wn.2d 848, 850–51 (2019)). And while defendants assert undue delay,
 17 standing alone, that is not adequate to deny leave to amend. *DCD Programs, Ltd. v. Leighton*,
 18 833 F.2d 183, 187 (9th Cir. 1987). Here, the matter is in its early stages, plaintiff’s attorney
 19 asserts that she made a mistake by not including a WLAD claim, and the ends of justice and
 20 judicial efficiency are best served by allowing amendment, where plaintiff is also being granted
 21 leave to amend her complaint in other regards.

22 Therefore, plaintiff’s intentional infliction of emotional distress/outrage claim is
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1 dismissed. Plaintiff is granted leave to amend her complaint to assert a claim under WLAD.

2 **SUMMARY AND INSTRUCTIONS TO THE PARTIES**

3 All of plaintiff's claims are dismissed, except her claims for injunctive relief against
4 defendant Rakevich for alleged equal protection violations. Dismissal of the claims (1) against
5 defendant Ludwig (except as otherwise stated herein), (2) for procedural due process violations,
6 and (3) for intentional infliction of emotional distress is with leave to amend. Plaintiff may also
7 amend her complaint to include a claim under WLAD. Plaintiff is not granted leave to amend
8 any of her other claims. Plaintiff shall file any amended complaint on or before **March 19,**
9 **2021**, and an answer thereto shall be timely filed.

10 **CONCLUSION**

11 For the reasons set forth above, the Court grants the motion to dismiss (Dkt. 14). The
12 Clerk's Office shall update the docket to reflect that any amended complaint is due on or before
13 March 19, 2021. The Clerk's Office shall also terminate defendants Ludwig and Smith.

14 The Court further *sua sponte* strikes the deadlines set in the Court's pretrial scheduling
15 order, including the deadline for filing of a joint status report. Dkt. 12. Upon filing of the
16 amended complaint, the Court will issue new deadlines in this matter.

17 Dated this 4th day of March, 2021.

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21 J. Richard Creatura
22 United States Magistrate Judge
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